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**OFFICE OF PETITIONS**

In re Application of  
Williamson, et al.  
Application No. 09/299,068  
Filed: April 23, 1999  
Attorney Docket No. 25932-5

ON PETITION

This is a decision on the petition under 37 CFR 1.137(a), filed December 5, 2002, to revive the above-identified application on the basis of unavoidable delay.

The petition under 37 CFR 1.137(a) is **DISMISSED**.

Any request for reconsideration of this decision must be submitted within **TWO (2) MONTHS** from the mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled, "Renewed Petition under 37 CFR 1.137(a)."

The above-identified application became abandoned for failure to timely file a proper response to the final Office action mailed April 25, 2002, which set a shortened statutory period for reply of three months. On October 15, 2002, applicant obtained a three month extension of time and filed a Continued Prosecution Application (CPA). However, the CPA was not proper because the application contained an earlier CPA that was filed after May 29, 2000.<sup>1</sup> Accordingly, the CPA was treated as a Request for Continued Examination (RCE) under 37 CFR 1.114. However, the RCE was not proper because it was not accompanied by a submission. A Notice of Improper RCE was mailed on October 24, 2002. No proper reply to the final Office action having been received, the above-identified application became abandoned on October 26, 2002. The mailing of this decision precedes the mailing of a Notice of Abandonment.

Consideration of petition under 1.137(a) (Unavoidable Delay):

A grantable petition under 37 CFR 1.137(a) must be accompanied by: (1) the required reply, unless previously filed; (2) the petition fee as set forth in 37 CFR 1.17(1); (3) a showing to the

<sup>1</sup> The earlier filed CPA was filed on November 13, 2001.

satisfaction of the Commissioner that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(a) was unavoidable; and (4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required pursuant to 37 CFR 1.137(c).

The instant petition does not satisfy requirement (3).

As to requirement (3), decisions on reviving abandoned applications on the basis of "unavoidable" delay have adopted the reasonably prudent person standard in determining if the delay was unavoidable: "The word 'unavoidable' ... is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business."<sup>2</sup>

Moreover, delay resulting from the lack of knowledge or improper application of the patent statutes, rules of practice or the MPEP, however, does not constitute "unavoidable" delay.<sup>3</sup>

Petitioner states that he "believed" the CPA filed on October 15, 2002 was a proper response. Moreover, petitioner states that he had "intended" to submit a Preliminary Amendment with the CPA. Petitioner failed to establish why he did not include a Preliminary Amendment with the CPA.

**Petitioner was responsible for knowing the proper response to a final Office action.**

A proper response to a final Office action consists of either (1) a Notice of Appeal; (2) an amendment that *prima facie* places the application in condition for allowance; (3) the filing of a continuing application under 37 CFR 1.53(b) **or if applicable**, 1.53(d); (4) a Request for a Continued Examination (RCE) under 37 CFR 1.114; or (5) if applicable, a 37 CFR 1.129(a) submission.

#### Conclusion:

While the showing of record is not sufficient to establish to the satisfaction of the Commissioner that the delay was unavoidable, applicant is not precluded from obtaining relief by filing a request for reconsideration pursuant to 37 CFR 1.137(b) on the basis of unintentional delay. A grantable petition under 37 CFR 1.137(b) must be accompanied by: (1) the reply required to the outstanding Office action or notice, unless previously filed; (2) the petition fee set forth in 37 CFR 1.17(m)<sup>4</sup>; (3) a statement

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<sup>2</sup> In re Mattulath, 38 App. D.C. 497, 514-15 (1912) (quoting Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (1887)); see also Winkler v. Ladd, 221 F. Supp. 550, 552, 138 U.S.P.Q. 666, 167-68 (D.D.C. 1963), aff'd, 143 U.S.P.Q. 172 (D.C. Cir. 1963); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (1913).

<sup>3</sup> See Haines, 673 F. Supp. at 317, 5 U.S.P.Q. 2d at 1132; Vincent v. Mossinghoff, 230 U.S.P.Q. 621, 624 (D.D.C. 1985); Smith v. Diamond, 209 U.S.P.Q. 1091 (D.D.C. 1981); Potter v. Dann, 201 U.S.P.Q. 574 (D.D.C. 1978); Ex parte Murray, 1891 Dec. Comm'r Pat. 130, 131 (1891).

<sup>4</sup> Effective January 1, 2003, the fee for a petition to revive under 37 CFR 1.137(b) (small entity) was increased to \$650.

that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unintentional; and (4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required pursuant to 37 CFR 1.137(d).

The petition fee of \$55 has been charged to Deposit Account No. 04-0258, as authorized.

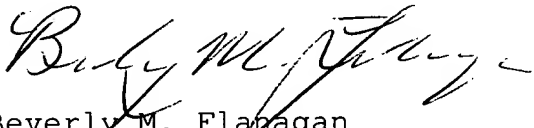
Further correspondence with respect to this matter should be addressed as follows:

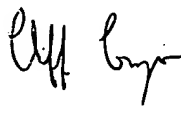
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